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NTSB Order No.: EA-4599

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of October, 1997

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-14312 and
)	SE-14313
)	
RICHARD PRUSS and)	
FLOYD DOUGLAS,)	
)	
Respondents.)	
)	

OPINION AND ORDER

Respondents appeal the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered at the conclusion of an evidentiary hearing held on April 8, 1996.¹ By

¹ An excerpt from the hearing transcript containing the initial decision is attached.

that decision, the law judge found that respondents had violated sections 121.315(c) and 121.535(f) of the Federal Aviation Regulations ("FAR").² We deny respondents' appeal.

The Administrator's complaints alleged that on March 9, 1995, respondents, the flight crew of a USAir MD-80, Flight 1672, departed Erie, Pennsylvania ("ERI"), without the required amount of fuel. Specifically, the Administrator alleged that Flight 1672 took off with less fuel than was specified in the flight's dispatch release. Respondents contend that they complied with the requirements of the dispatch release, and argue that the evidence presented at the hearing was not legally sufficient to sustain violations of either §§ 121.315(c) or 121.535(f).³ The

² FAR §§ 121.315(c) and 121.535(f), 14 C.F.R. Part 121, provide, in relevant part, as follows:

§ 121.315 Cockpit check procedure.

* * * * *

(c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft.

**§ 121.535 Responsibility for operational control:
Flag air carriers.**

* * * * *

(f) No pilot may operate an aircraft in a careless or reckless manner so as to endanger life or property.

³ In addition, respondents argue that the law judge should have granted their motion to dismiss for lack of evidence.

Administrator argues that the evidence was sufficient to support the law judge's findings, even though the actual dispatch release was lost by USAir.⁴

At the hearing, the Administrator presented the testimony of Mr. Paul Malobisky, USAir's Director of Operations Control. Mr. Malobisky based much of his testimony on computer records which USAir maintains for every flight. See Exhibits ("Ex.") A-3 and A-4. These records showed the "flight history" of Flight 1672. Tr. at 45. Mr. Malobisky testified that the information in these records is identical to the substance of the actual dispatch release. Tr. at 51, 60. He explained that the record of Flight 1672 showed that the minimum gate release fuel load was 16,800 pounds and the minimum takeoff fuel load was in excess of 14,000 pounds.⁵ Finally, Mr. Malobisky testified that respondents

⁴ The FAA assessed a fine against USAir for failing to retain this document. Respondent's Brief at 15; see 14 C.F.R. § 121.695(b) (requiring air carriers to keep, for at least three months, copies of, among other records, dispatch releases).

⁵ Exhibit A-3, a photocopy of the computer record of the flight release for Flight 1672, indicates that the minimum takeoff fuel load -- indicated in hundreds of pounds -- for Flight 1672 was "14_." The last digit is illegible. However, because it is clear from this computer record that more than fourteen thousand pounds was specified, the inability to decipher this last digit does not affect our resolution of this appeal.

nonetheless reported that Flight 1672's fuel load was only 13,800 pounds at takeoff. Tr. at 52.⁶

The Administrator also presented the testimony of Mr. Robert Isaac, an aircraft fueler at ERI. Mr. Isaac testified that USAir Operations at ERI called to tell him that Flight 1672 needed to be "fueled to 16,800 pounds." Transcript ("Tr.") at 13. He also testified that he never added fuel to Flight 1672. Tr. at 17-18. Mr. Isaac testified that while he was checking the fuel sumps on Flight 1672 in preparation for fueling, a sump leak developed when one of the valves stuck open due to the cold weather. Tr. at 13. He testified that he drove his fuel truck to the airport's fuel farm and was in the process of defueling the truck, in order to off-load fuel from the leaking tank, when he saw Flight 1672 take off. Id.

Finally, the Administrator presented the testimony of Mr. Kenneth Shuman, a Federal Aviation Administration inspector. Mr. Shuman testified about the MD-80's checklists and demonstrated how respondents should have detected that Flight 1672 did not

⁶ Respondents reported this information via the Aircraft Communications and Reporting System ("ACARS"), an alphanumeric down-link between the aircraft and ground personnel. The ACARS messages from Flight 1672 are recorded in Exhibit A-3. It is not clear from the record whether the entry of 13,800 pounds represents Flight 1672's fuel load at takeoff or at the time it pushed back from the gate.

have the amount of fuel required by the dispatch release. Tr. at 102-105.

Respondents testified on their behalf but did not call any other witnesses. Captain Pruss could not recall what the dispatch release specified for the minimum takeoff fuel load. Tr. at 194. However, he testified that, immediately prior to takeoff, he and First Officer Douglas cross-checked the minimum takeoff fuel load specified in the dispatch release with the amount of fuel actually on board the aircraft and confirmed that the aircraft had the required amount of fuel. Tr. at 192-94. First Officer Douglas testified that the dispatch release specified a minimum takeoff fuel load of 13,300 pounds. Tr. at 230.

We believe that the evidence is sufficient to establish that the dispatch release required a minimum takeoff fuel load of at least 14,000 pounds. Indeed, the only evidence indicating otherwise was respondents' own testimony, much of which was based on assumptions rather than positive recollection. Moreover, the law judge necessarily assessed respondents' credibility in making his decision, and it is well settled that such credibility determinations are given deference. Administrator v. Bargen, 5 NTSB 757, 760 (1985).⁷ Accordingly, we affirm the finding that

⁷ Throughout their appeal brief, respondents attempt to reargue
(continued ...)

respondents violated section 121.315(c). The MD-80 checklist required that immediately preceding takeoff respondents confirm that the fuel on board Flight 1672 was at least the minimum specified in the dispatch release. Ex. A-7. Because Flight 1672 took off with no more than 13,800 pounds of fuel on board, and the evidence established that the dispatch release required at least 14,000 pounds of fuel, respondents could not have adhered to the checklist.

Respondents argue that they are prejudiced by the missing dispatch release. Respondents' Brief at 8. Respondents' argument, however, is based on the assumption, contradicted by all of the Administrator's evidence, that the dispatch release would corroborate their claim. Cf. Administrator v. Crist, NTSB Order No. EA-4512 at 5-7 (1996) (discussing our reluctance to assume, absent an indication of intentional destruction or withholding of exculpatory evidence, that radar tapes not introduced by the Administrator would corroborate a pilot's defense). The fact that the dispatch release was missing, through no fault of the Administrator, forced the parties to resort to circumstantial evidence to establish the contents of

the credibility of Mr. Isaac's and Mr. Malobisky's testimony. These issues were before the law judge, however, and we decline to second-guess the law judge's credibility determinations. Harris v. Myrick, NTSB Order No. EA-3578 at 6-8 (1992).

the dispatch release. This, however, produced no prejudice; rather, the Administrator merely presented the more persuasive circumstantial evidence -- including the computer record of Flight 1672's "history" -- on the matter.⁸

Respondents also argue that there is "no record evidence" to sustain a violation of FAR 121.535(f). Respondents' Brief at 14. A violation of FAR 121.315(c), however, is ample support for a charge of carelessness or recklessness. Administrator v. Weiland and Perry, NTSB Order No. EA-4190 (1994).⁹

⁸ Respondents argue that the computer records "could not be confirmed as being secure," and therefore cannot be relied upon. Respondents' Brief at 9. First, we note that concerns about the security of such records would go to the weight and not the admissibility of the evidence. Second, we discern nothing in the record to indicate that respondents were able to raise any substantial inferences of actual or potential instances of tampering with the computer records. In fact, Mr. Malobisky testified that the computer records could only be accessed by his department and that other individuals could not update or delete the information in the files. Tr. at 48, 62.

⁹ Respondents also appeal the law judge's dismissal of their motion to dismiss which was based on the fact that the dispatch release was missing. Respondents' Brief at 14-15. Because we have concluded that the missing dispatch release did not prejudice respondents, respondents' argument that the motion should have been granted is now moot. Cf. Lindsay v. National Transp. Safety Bd., 47 F.3d 1209, 1214 (D.C. Cir. 1995) (stating that "[a] defendant waives an appeal of the denial of a directed verdict motion by putting on evidence"). Respondents also argue that the law judge's denial of their motion "demonstrated bias toward the Administrator" because the law judge accepted the Administrator's averments that the evidence adduced at the hearing would be sufficient to sustain the charged violations. Respondents' Brief at 15-16. An unfavorable ruling is not evidence of bias, however, and we find nothing else in the record
(continued ...)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied; and
2. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

to support this argument.